IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 10-0109

RENEE GRIFFITH)
Plaintiff and Appellant,)
)
and)
)
BUTTE SCHOOL DISTRICT NO. 1,)
CHARLES UGGETTI AND JOHN)
METZ,)
Defendants and Appellees.)

ORIGINALLY ON APPEAL FROM THE
MONTANA THIRTEENTH JUDICIAL DISTRICT COURT YELLOWSTONE COUNTY
THE HONORABLE GREGORY R. TODD

BRIEF OF DEFENDANTS AND APPELLEES

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I. STATEMENT OF ISSUES

1. Whether Appellant's Claims are moot.

2. Whether the District Court correctly granted summary judgment to the Appellee.

II. STATEMENT OF THE CASE, STATEMENT OF FACTS, AND STANDARD OF REVIEW

The Appellee (the District) agrees with the Appellant's (Griffith's) Statement of the Case, Statement of Facts, and Standard of Review, with the exception that the District asserts that the complaint states a case for discrimination in education.

III. SUMMARY OF THE ARGUMENT

Griffith's claims remaining on appeal are moot. Griffith certified to the Court in her Notice of Appeal that she seeks no money damages in this case. Prospective or injunctive relief is available as a remedy under the Montana Human Rights Act (MHRA), but Griffith has not appealed from the District Court's conclusion that the MHRA has not been violated. Griffith did not seek prospective or injunctive relief in her Complaint, and lacks standing to do so via her constitutional claims, as she is no longer a student of the District.

The District Court correctly concluded that the MHRA provides the exclusive remedy for Griffith's claims pursuant to § 49-2-512(1), MCA. The factual allegations in this case are that Griffith, an individual enrolled as a student

in an educational institution, was deprived of a privilege of the institution (speaking at graduation) because of religion. The exact same factual allegations underlie every cause of action in the complaint. Because these factual allegations fall within the definition of "discrimination in education" (§ 49-2-307(1), MCA), the MHRA provides the exclusive remedy, and the remaining causes of action are barred.

The MHRA exclusive remedy provision applies to causes of action alleging violations of the Montana Constitution, as well as actions under 42 U.S.C. § 1983. This Court has previously determined that the MHRA bars state constitutional torts when the gravamen of the case is discrimination. The plain language of § 49-2-512(1), MCA, precludes the Court from entertaining any "claim or request for relief" other than by the procedures set forth in Title 49, with no exception for federal causes of action.

The District Court correctly concluded that application of § 49-2-512(1), MCA, to federal causes of action does not violate the Supremacy Clause of the U.S. Constitution, and this Court is precluded from considering Griffith's constitutional challenge to § 49-2-512(1), MCA, pursuant to Rule 27, M.R.App.P.

The intent of the District in permitting valedictorians to speak at gradation was not to create an open forum for speakers to address the captured audience attending graduation on any topic of their choosing. The District maintained

control over all aspects of graduation, including valedictorian speeches. To the extent that the District may have created a limited public forum, the District's restrictions on acceptable content were both reasonable and viewpoint neutral. As a result, the District did not violate Griffith's free speech rights.

The District's actions did not compel Griffith to engage in conduct proscribed by her religious faith, nor did they prevent Griffith from performing some act mandated by her religion. The District's request that Griffith refrain from expressing her personal religious beliefs during the graduation ceremony did not unduly burden the free exercise of her religion.

The District's actions implicated no fundamental rights, and were reasonable in light of the forum in question, i.e. a graduation ceremony. District policies and practices regarding religion in school are clearly intended to maintain neutrality towards religion, and place reasonable constraints upon when religious expression is appropriately permitted. These policies apply equally to all students, and all religious speech, and do not violate the equal protection clause of the Fourteenth Amendment.

IV. ARGUMENT

A. MOOTNESS

Included in the Notice of Appeal filed in this case is the Appellant's certification to the Court as follows:

THE APPELLANT FURTHER CERTIFIES:

> *1. That this appeal is not subject to the mediation process required by M.R.App.P. 7. The issue is not a matter of Workers Compensation, family law,* ***nor it is*** *[sic]* ***for monetary damages.*** *It deals with the constitutional rights of an individual.*

(Notice of Appeal, pp. 1 & 2, emphasis added).

Griffith has therefore certified to the Court that she seeks no money damages in this case. As a result, the only possible avenue of relief would be some form of injunctive or declaratory relief to prevent the alleged wrong at issue from reoccurring. Griffith did not, however, seek injunctive relief from the District Court, and lacks standing to do so via her various constitutional tort claims.

While it is given that the District Court (and this Court) may grant injunctive-type relief pursuant to § 49-2-506, MCA, upon finding a violation of the MHRA, the District Court found no violation of the MHRA, and Griffith has not appealed that determination. What remains, then, are claims for constitutional violations with a certification that no money damages are sought as a remedy.

On that basis, it is submitted that Griffith's remaining causes of action should be dismissed based on the doctrine of mootness. The doctrine of mootness requires that "the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Plan Helena, Inc. v. Helena Regional Airport Authority Bd.*, 2010 MT 26, ¶ 10, 355 Mont. 142, 226 P.3d 567. "Mootness is a threshold issue which we must

resolve before addressing the substantive merits of a dispute." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864.

"A court lacks jurisdiction to decide moot issues or to give advisory opinions insofar as an actual 'case or controversy' does not exist." *Plan Helena, Inc.*, ¶ 11. Mootness is a question of subject matter jurisdiction and the lack of subject matter jurisdiction can be raised at any time in the proceedings. *Stanley v. Lemire*, 2006 MT 304, ¶ 31, 334 Mont. 489, 148 P.3d 643; *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985).

Griffith's claims are moot because she has already graduated from high school and will not go through the graduation ceremony again or have the opportunity to give the valedictorian speech and because she is not seeking any monetary damages. "Generally, once a student graduates, he no longer has a live case or controversy justifying declaratory and injunctive relief against a school's action or policy, and his case is therefore moot." *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2008); *see also Sandison v. Michigan High School Athletic Ass'n, Inc.*, 64 F.3d 1026, 1029-30 (6th Cir. 1995).

If Griffith were seeking monetary damages, however minimal, in this matter, she may have an argument that her claims are not moot. *See Cole v. Oroville Union High School Dist.*, 228 F.3d 1092, 1099 (9th Cir. 2000) ("Although a student's graduation moots his claims for declaratory and injunctive relief against

school officials, it does not moot his damage claims."). However, as certified to the Court in her Notice of Appeal, Griffith is not seeking any sort of monetary damages. Furthermore, as Griffith has already graduated and the graduation ceremony at issue was held and completed over two years ago, there would be no possible injunctive or declaratory order that could provide her with any sort of relief as she will never again have to confront the actions giving rise to her Complaint.

Crucially, Griffith cannot argue that this is an example of the "capable of repetition, yet evading review" exception to the mootness doctrine unless she satisfies two elements: (1) that the challenged conduct is of limited duration and evades review, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Havre Daily News, LLC*, ¶ 34; *Petition of Billings High School Dist. No. 2 v. Billings Gazette*, 2006 MT 329, ¶ 14, 335 Mont. 94, 149 P.3d 565.

In regard to the first element of the exception, a legal challenge to a graduation speech issue is "not so inherently limited in duration that the action will become moot before the completion of appellate review." *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 798 (9th Cir. 1999) (internal quotation marks omitted). As noted by the Ninth Circuit in *Doe*, there are several examples where graduation prayer disputes have been brought to a court for review and were

litigated without becoming moot. *See e.g. Lee v. Weisman*, 505 U.S. 577, 584, 112 S. Ct. 2649, 2654 (1992); *ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1475-76 (3rd Cir. 1996); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 295, 120 S. Ct. 2266, 2271-72. The same analysis applies to this case, and Griffith simply cannot demonstrate that a legal challenge to a graduation dispute will always be of limited duration and evade review.

More importantly, Griffith cannot satisfy the second element of the exception, as she has already graduated from high school and will not go through the ceremony again, let alone have the opportunity to speak at the graduation ceremony in her capacity as valedictorian. "A question is moot when the court cannot grant effective relief." *Havre Daily News, LLC*, ¶ 34. The Court cannot grant any effective relief in this matter, and, as a result, all of Griffith's claims on appeal are moot, and the District respectfully requests that her claims be dismissed with prejudice.

B. GRAVAMEN OF THE CASE IS DISCRIMINATION

As correctly asserted by Griffith, the District Court dismissed Counts III through VI of the Complaint pursuant to § 49-2-512(1), MCA, which provides as follows:

> *The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102.*

A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

§ 49-2-512(1), MCA.

Griffith incorrectly asserts, however, that dismissal of Counts III through VI was based upon a conclusion that "because a claim is filed before the [Montana Human Rights Bureau], the plaintiff is barred from pursuing other legal claims not sounding in discrimination." (Appellant's Brief, p. 15). Whether or not a claim has been filed with the Human Rights Bureau has no bearing on the determination.

This Court made it abundantly clear in *Saucier vs. McDonald's Restaurants of Montana, Inc.*, 2008 MT 63, 179 P.3d 481 (2008), that the District Court must review the "nature of the acts alleged by the plaintiff, as opposed to the manner in which the complaint is framed, to determine the 'gravamen' of the complaint." *Saucier*, supra, ¶ 56. "The gravamen depends on the nature of the alleged conduct, and not upon the technical format of the complaint or procedural aspects of the case." *Saucier*, supra, ¶ 57.

If the nature of the alleged conduct is discrimination, then tort claims arising from the same alleged conduct are barred by the exclusivity provisions of the MHRA. Conversely, if the Court determines that "the alleged conduct goes beyond the type of discriminatory actions contemplated by the MHRA," then the plaintiff may maintain the tort claims, but "may not simultaneously proceed in the District Court with a discrimination claim." *Saucier*, supra, ¶ 80.

Thus, the fact that the case was initially filed with the Human Rights Bureau (HRB) is irrelevant to the Court's determination, as is the fact that the HRB investigation resulted in a finding of no reasonable cause to support the allegations of discrimination. Just as irrelevant is the fact that the investigator for the HRB stated in the final investigative report that the HRB "has no authority to investigate free speech violations and this report does not address that issue." (Appellant's Brief, pp. 12 & 13). Neither the District Court nor this Court is bound by a statement of the HRB investigator explaining the limits of the investigative authority of the HRB.

Rather, the District Court was charged with reviewing the allegations stated in the complaint in order to determine whether the gravamen of the complaint is discrimination. In this case, the District Court did so, stating as follows:

> *This Court is tasked with determining whether the facts alleged by Griffith constitute discrimination in education or if they are grounded in something different. The gravamen of Griffith's complaint with the State of Montana Human Rights Bureau, her Complaint in this Court, and her Motion for Summary Judgment all argue that the conduct of the Defendants constituted "discrimination in education in violation of Mont. Code Ann. § 49-2-307(1)."*

This is consistent with this Court's interpretation of the exclusive remedy provision of the MHRA, as set forth in *Saucier*:

> *...in determining whether a plaintiff has stated a tort claim or a discrimination claim, we look to the gravamen of the complaint. When the gravamen is ascertained, the complaint is thereby designated as either a tort action or a discrimination action. If the alleged conduct falls outside the*

> *MHRA's definition of unlawful discrimination, the plaintiff may maintain a tort action. However, because the MHRA establishes the exclusive means of legal redress for unlawful discrimination, § 49-2-509(7), MCA, the plaintiff may not simultaneously proceed in district court with a discrimination claim based on the same allegations when it is determined that the complaint sounds in tort.*

Saucier, supra, ¶ 79.

In this case, the District Court correctly designated this case as a discrimination action. As noted by the District Court, Count I of the Complaint alleges that the District's act of preventing Griffith from speaking during the graduation ceremony unless she agreed to remove religious references from her proposed speech was "violative of the Montana Human Rights Act, 49-2-101 MCA et seq." (Complaint, p. 2).

Griffith expanded upon this allegation in support of her Motion for Summary Judgment, asserting as follows:

> *Count I of the Complaint alleges that the Defendants' conduct forbidding Renee from giver her graduation speech because of her references to "Christ" and "God" constituted discrimination in violation of § 49-2-307(1) M.C.A. That statute provides that "[i]t is an unlawful discriminatory practice for an educational institution: (1) to...discriminate against...an individual enrolled as a student in the terms, conditions or privileges of the institution because of..., religion[.]"*

(Plaintiff's Summary Judgment Brief, p. 6). That portion of Griffith's argument went on to discuss that, by virtue of the fact that Griffith was one of several valedictorians of her class, she was "entitled to the privilege of addressing those gathered for the Butte High School Class of 2008 graduation ceremony," and that

she "could not be deprived of this privilege 'because of religion.'" (Plaintiff's Summary Judgment Brief, p. 6).

Thus, the factual allegations in this case are that Griffith, an individual enrolled as a student in the Butte School District, an educational institution, was deprived of a privilege of the institution because of religion. These factual allegations fall squarely within the definition of "discrimination in education" as set forth in § 49-2-307(1), MCA:

> *It is an unlawful discriminatory practice for an educational institution...to exclude, expel, limit, or otherwise discriminate against...an individual enrolled as a student in the terms, conditions, or privileges of the institution because of ...religion...unless based on reasonable grounds.*

It is undisputed in this case that the District is an "educational institution;" that Griffith was "an individual enrolled as a student;" and that class valedictorians were granted the privilege of giving a speech during the graduation ceremony. It is also undisputed that the District requested that Griffith remove religious references from her proposed speech; that she refused to do so; and that she was then not permitted to speak during the graduation ceremony.

The sole issue before the District Court under Count I of the Complaint was whether the District had "reasonable grounds" for denying Griffith the privilege of speaking at graduation on the basis of the religious references in her proposed speech. The District Court concluded that there were reasonable grounds for the District's actions, and, therefore, no violation of § 49-2-307, MCA, had occurred.

Griffith has not appealed that determination, and, instead, now asserts that this is not a discrimination case at all. Rather, Griffith asserts that this is a constitutional tort case, and that her causes of action under Counts III through VI of the Complaint are not barred by § 49-2-512, MCA. This is incorrect. As stated by this Court in *Saucier*, the plaintiff may only "maintain a tort action" when "the alleged conduct falls outside the MHRA's definition of unlawful discrimination." *Saucier*, supra, ¶ 79.

Griffith asserts, however, that "where the grounds for a claim are different from the grounds underlying the kind of discrimination forbidden by the MHRA, the claim is not barred." (Appellant's Brief, p. 14). This is also not correct. This Court addressed a similar situation in *Harrison vs. Chance*, 244 Mont. 215, 797 P.2d 200 (199).

In *Harrison*, the plaintiff brought suit alleging "tortious battery, intentional infliction of emotional distress, the tort of outrage, wrongful discharge, and breach of the implied covenant of good faith and fair dealing. *Harrison*, supra, at 223; 205. In determining that the MHRA provided the exclusive remedy for Harrison's allegations, the Court stated as follows:

> *It may be that the alleged acts provide grounds for these and other tort claims. However, the gravamen of the appellant's claim is sexual harassment. Her claim of battery is based on an allegation that Chance forcefully kissed her against her will. The intentional infliction of emotional distress and outrage arise from charges that Chance repeatedly confronted Harrison with sexually explicit innuendos and offers. Likewise, the theories*

> *of wrongful discharge and breach of the implied covenant of good faith and fair dealing are based on Harrison's allegations that Chance's constant sexual harassment made her working conditions so intolerable that she was forced to resign.*
>
> *As in this case, any claim based on sexual harassment can be framed in terms of numerous tort theories. The legislature expressed its intent that the Commission provide the exclusive remedy for illegal discrimination when it enacted subsection (7) of § 49-2-509, MCA. To allow such re-characterization of what is at heart a sexual discrimination claim, would be to eviscerate the mandate of the Human Rights Commission. The District Court did not err in holding that the Human Rights Commission provided the exclusive remedy for the appellant's claim.*

Harrison, supra, at 223; 205.

The same analysis applies in this case, and to an even greater extent. Harrison made various factual allegations all of which, in the end, constituted sexual harassment. In this case, Griffith has asserted that a single alleged act of the District (i.e. that the District deprived Griffith of the privilege of speaking at graduation based on her refusal to remove religious references from her proposed speech), constitutes a violation of the MHRA, as well as the First and Fourteenth Amendments to the U.S. Constitution and Article II, Sections 5 and 7 of the Montana Constitution.

As in *Harrison*, it may be that the alleged act of the District may provide grounds for Griffith's various causes of action, and, indeed, for other causes of action not brought by Griffith. However, as in *Harrison*, the gravamen of the case is discrimination, and Griffith should not be permitted to recharacterize the exact

same allegation as four additional causes of action simply because the District Court (and, for that matter, the HRB) did not rule in her favor on the discrimination claim.

C. STATE CONSTITUTIONAL CLAIMS BARRED BY MHRA

In addition to asserting that this case is not a discrimination case, Griffith argues further to the effect that the identified constitutional provisions are self-executing, and not within the parameters of the MHRA:

> *The guarantees of free speech and free exercise of religion apply regardless of whether the government decision infringing on the right are based on the particular status of the aggrieved individual. Whereas action intentionally based upon protected status, i.e. race, sex, or color, is a requirement for a discrimination claim under the MHRA, such status-based action is not required for a claim grounded on a deprivation of the constitutional rights to free speech or free exercise of religion.*

(Appellant's Brief, p. 17). This Court has, however, previously found that constitutional torts, like any other cause or claim for relief, are barred by the MHRA when the allegations underlying the claims fall within the definition of unlawful discrimination set forth in the MHRA.

In *Harrison*, the Court disposed of just such an argument as follows:

> *Freedom from sexual discrimination is a constitutional right in Montana under Article II, Section 4, of the Montana Constitution, but no person has a vested interest in a particular remedy to a violation to that right. The legislature is free to impose reasonable procedural requirements on the available remedies so long as those requirements have a rational basis. We have already held that the legislature had a rational basis for making the Human Rights Commission the exclusive means of combating illegal discrimination in Montana.*

Harrison, supra, at 225; 206 (internal citations omitted).

Similarly, in *Edwards vs. Cascade County Sheriff's Dept.*, 2009 MT 451, 354 Mont. 307, 223 P.3d 893 (2009), the plaintiffs, in addition to a claim under the MHRA asserting political discrimination, also brought claims alleging violations of Article II, Sections 6, 7, 10 and 17 of the Montana Constitution. The District Court determined that "the constitutional claims of interference with assembly, speech, privacy and due process...are actually components of their underlying political discrimination claims," and "held that the Appellants were required...to present them to the HRB in order to preserve them in District Court." *Edwards*, supra, ¶ 56.

On appeal, this Court stated as follows:

> *...we agree with the District Court that for purposes of the MHRA the gravamen of Count I was discrimination and that the Appellants were required to bring these claims before the HRB as a precondition to filing suit in District Court. Thus...these Appellants are now barred from bringing the claims in Count I for failure to comply with the MHRA.*

Edwards, supra, ¶ 57 (internal citations omitted). Thus, when the gravamen of the factual allegations fall within the parameters of unlawful discrimination, the exclusive remedy is the MHRA. This is true even when, as in this case, the factual allegations can be recharacterized to state a claim for a violation of the Montana Constitution. Furthermore, this is true even when the provision of the Montana Constitution at issue provides for a fundamental right such as free speech, freedom

of assembly, the right to privacy, or the free exercise of religion.

Because the gravamen of the factual allegations is that the District denied Griffith, an enrolled student, of a privilege of the District on the basis of religion, the exclusive remedy in this case is provided by the MHRA. As a result, Griffith's causes of action alleging violation of Article II, Sections 5 and 7 are barred pursuant to § 49-2-512, MCA, and summary judgment on those causes of action was correctly entered by the District Court in the District's favor.

D. ACTIONS BROUGHT UNDER 42 U.S.C. § 1983 BARRED BY THE MHRA

The District Court granted summary judgment to the District on Counts V and VI of the Complaint (First and Fourteenth Amendments to the U.S. Constitution brought via 42 U.S.C. § 1983), concluding that § 49-2-512(1), MCA, bars actions brought under 42 U.S.C. § 1983 when the gravamen of the claims are discrimination. (District Court Order, pp. 7 – 9). On appeal, Griffith makes a two-fold argument in opposition to the District Court's determination.

First, Griffith asserts that legislative history indicates no legislative intent to bar federal law causes of action. Secondly, Griffith asserts that application of § 49-2-512(1), MCA, to federal law causes of action is unconstitutional as contrary to the Supremacy Clause of the U.S. Constitution. Both arguments are problematic considering that the District Court applied § 49-2-512(1), MCA, exactly as it is written.

The statute reads as follows:

> *The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102.* ***A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.***

(§ 49-2-512(1), MCA, emphasis added). The statutory language includes no exception for federal law causes of action, just as there is no exception for constitutional tort claims alleging violation of the Montana Constitution.

To the contrary, the statute states in plain language that the MHRA provides the exclusive remedy for acts constituting an alleged violation of the MHRA, and that a district court may not entertain any "claim or request for relief" other than by the procedures set forth in the MHRA. An action brought pursuant to 42 U.S.C. § 1983 clearly constitutes a "claim or request for relief" falling outside of the procedures specified in Title 49 of the Montana Code Annotated.

"In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." (§ 1-2-101, MCA). Griffith seeks to insert an exception to § 49-2-512(1), MCA, that is clearly not set forth in the plain language of the statute.

The legislative history relied upon by Griffith consists of the rationale set forth for a statutory amendment by LeRoy H. Schramm, Chief Legal Counsel of

the Montana University System in 1987. As noted by this Court in *Harrison*, the Legislature subsequently adopted Mr. Schramm's proposed amendment "without change or comment." *Harrison*, supra, at 220; 203. The Court went on to discuss the fact that "it is not clear that the legislature adopted Chief Counsel Schramm's rationale," but that "the plain language of the provision indicate[s] that the legislature intended the procedures of the Human Rights Commission provide the exclusive remedy for discrimination in employment." *Id.*

The fact that the Legislature adopted a proposed amendment "without change or comment" strongly indicates nothing more than a lack of legislative history, and sheds no light on the intention of the Legislature in adopting the amendment. There is certainly no indication that the Legislature intended to bar only causes of action brought under state law, but nevertheless failed to include an exception for federal law causes of action.

Perhaps more importantly, the legislative history of § 49-2-512(1), MCA, has very little, if any, bearing upon the Court's interpretation of the statute. This Court has interpreted the requirements of § 1-2-101, MCA, on numerous occasions, and has consistently reached the following or similar conclusions:

> *Our role in interpreting statutes is simply "to ascertain and declare what is in terms or in substance contained therein...." We must pursue legislative intent if possible. Where the intention of the legislature can be determined from the plain meaning of the words used, our role in interpreting the statute is at an end. Where the language is clear and unambiguous, the statute speaks for itself and we will not resort to legislative history or other*

extrinsic means of interpretation.

Estate of Garland, 279 Mont. 269, 273 & 274, 928 P.2d 928, 930 (1996) (internal citations omitted).

Thus, when statutory language is clear and unambiguous, it must be applied as written. Only when the language is ambiguous is legislative history utilized to determine the intent of the Legislature. There is nothing ambiguous about § 49-2-512(1), MCA, nor has Griffith asserted that the statute is ambiguous. The District Court was thereby obligated to apply the plain language of the statute as written, and this Court is obligated by the rules of statutory construction to do the same.

Of course, it goes without saying that both the District Court and this Court generally have the authority, upon determining legislative intent from the plain language of a statute, to also determine whether the intent of the legislature violates some provision of the Constitution. In this case, Griffith argued to the District Court in opposition to the District's Motion for Summary Judgment that application of the plain language of § 49-2-512(1), MCA, to federal causes of action would violate the Supremacy Clause of the U.S. Constitution. Griffith makes the same argument on appeal.

The District Court correctly concluded that § 49-2-512(1), MCA, does indeed bar federal causes of action when the gravamen of the underlying factual allegations is discrimination without violating the Constitution, and this Court is

precluded by Rule 27, M.R.App.P., from considering Griffith's direct challenge to the constitutionality of § 49-2-512(1), MCA.

Rule 27, M.R.App.P., provides as follows:

> ***Rule 27. Notice involving constitutional questions where the state is not a party.*** *Irrespective of the requirements of M. R. Civ. P. 24(d), a party who challenges the constitutionality of any act of the Montana legislature in any action, suit, or proceeding in the supreme court to which neither the state nor any agency or any officer or employee thereof, in the officer's or employee's official capacity, is a party, must give notice to the supreme court and to the Montana attorney general of the existence of the constitutional issue. This notice must be in writing, specify the section of the Montana Code Annotated or chapter of the session law to be construed, and must be given no later than 11 days from the date that the notice of appeal or notice of cross-appeal is filed or the date of filing of an original proceeding in the supreme court. No later than 20 days from the date that the notice of constitutional challenge is filed, the attorney general shall notify the supreme court and all parties in writing as to whether the attorney general will intervene in the appeal on the constitutional issue.*

Although Griffith certified to the Court in her Notice of Appeal that "no notice required is [sic] by M.R.App.P. 27 as there is no challenge to the constitutionality of any act of the Montana Legislature" (Notice of Appeal, p. 2), Griffith nevertheless has directly challenged the constitutionality of § 49-2-512(1), MCA, beginning on page 18 of the Appellant's Brief. What Griffith has not done is comply with Rule 27, M.R.App.P., which requires written "notice to the supreme court and to the Montana attorney general of the existence of the constitutional issue" within 11 days of the date of the Notice of Appeal.

In construing the predecessor to Rule 27, M.R.App.P, the Court has determined that "[former] Rule 38, M.R.App.P., procedurally governs cases involving constitutional questions where the state is not a party." *Haider vs. Frances Mahon Deaconess Hospital*, 2000 MT 32, ¶ 7, 298 Mont. 203, 204, 994 P.2d 1121 (2000). Furthermore, for the purposes of the Rule, neither "political subdivisions" of the state nor "local governments" are considered to be "the state [or] any agency or any officer or employee thereof..." *Weinart vs. City of Great Falls*, 2004 MT 168, ¶ 16, 322 Mont. 38, 42, 97 P.3d 1079, 1082 (2004). Thus, whether a school district is a political subdivision or a local government, it is not the State or an agency of the State for the purposes of the Rule.

As a result, Griffith has challenged the constitutionality of an act of the Montana Legislature in a case to which neither the State nor an agency of the State is a party, without complying with the notice requirements of Rule 27, M.R.App.P. In *Haider*, as well as in *Russell vs. Masonic Home of Montana, Inc.*, 2006 MT 286, 334 Mont. 351, 147 P.3d 216 (2006), the Court addressed the late filing of the notice required by former Rule 38, M.R.App.P. In both cases, the Court determined that "failure to file a notice of a constitutional challenge contemporaneously with a notice of appeal results in an appellant failing to 'procedurally comply with an essential condition precedent, thus precluding this Court from reaching the constitutional challenge.'" *Russell*, supra, ¶ 20.

While the current rule does not require that the notice be filed "contemporaneously" with the Notice of Appeal, it does require that the notice be filed with 11 days of the Notice of Appeal. (See Rule 27, M.R.App.P.) In this case, no notice was filed with the Court or served upon the Montana Attorney General at all. Griffith's failure to comply with Rule 27, M.R.App.P., thereby precludes the Court from considering her constitutional challenge to the plain language of § 49-2-512(1), MCA.

Even were the Court not precluded from considering the constitutional challenge, the District Court correctly concluded that application of § 49-2-512(1), MCA, to federal causes of action does not violate the Constitution. The District Court correctly relied upon *Haywood vs. Drown*, 129 S.Ct. 2108 (2009), in determining that § 49-2-512(1), MCA, is a "neutral rule of judicial administration." (District Court Order, p. 8). Because "the exclusivity provisions of the MHRA apply to **all** types of claims where the underlying allegations would constitute unlawful discrimination," and "apply equally to **all** claims or request for relief brought by **any** plaintiff against **any** defendant in state court," the statute falls into one of two exceptions identified by the Supreme Court in *Haywood* to a presumption of concurrent jurisdiction of state courts to hear federal causes of action. (District Court Order, pp. 7 - 9).

Furthermore, § 49-2-512(1), MCA, is not a "jurisdictional rule" the impact

of which is "to disassociate [the State] from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source," as asserted by Griffith. (Appellant's Brief, pp. 21 & 22, citing *Haywood*). The statute does not divest the state courts of jurisdiction to hear claims brought under 42 U.S.C. § 1983.

Rather, the statute does nothing more than to require the District Court to make a determination as to whether unlawful discrimination, as defined in the MHRA, has been alleged. If so, duplicative claims brought under other legal theories are barred. If not, the discrimination claim may not be maintained, but other causes of action proceed.

Additionally, this Court made it clear in *Vettel-Becker vs. Deaconess Medical Center of Billings*, 2008 MT 51, 341 Mont. 345, 177 P.3d 1034 (2008) that other causes of action may be maintained in the same action as a discrimination claim if the additional claims are "not premised upon 'underlying allegations of discrimination.'" *Vettel-Becker*, supra, ¶ 37. In that case, the plaintiff's action for wrongful discharge was not barred by the MHRA because, in stating his claim under the WDEA, the plaintiff did not rely upon "the same facts that supported his discrimination claim." *Vettel-Becker*, supra, ¶ 39.

In this case, however, each claim brought by Griffith is entirely duplicative of every other claim brought by Griffith. The Complaint alleges, in a nutshell, that

the District's act of denying Griffith the privilege of speaking at graduation based upon her refusal to remove religious references from her proposed speech constituted discrimination in education in violation of the MHRA, **and** constituted violations of the First and Fourteenth Amendments to the U.S. Constitution and Article II, Sections 5 and 7 of the Montana Constitution.

Each cause of action relies upon the exact same set of facts, and seeks the exact same remedy, i.e. "nominal and compensatory damages...in an amount to be determined at trial" and an award of attorney fees. (Complaint, p. 3). If Griffith's causes of action in addition to her discrimination claim relied upon different or additional facts than those underlying the discrimination claim, then they would not be barred by § 49-2-512(1), MCA.

Thus, the statute does not divest the courts of the State of Montana of jurisdiction over actions brought pursuant to 42 U.S.C. § 1983 any more than does it indicate disagreement with the content of federal law or a refusal to recognize the superior authority of the source of federal law. Rather, § 49-2-512(1), MCA, is nothing more than a neutral rule of judicial administration requiring the elimination of duplicative and superfluous causes of action.

E. FREE SPEECH UNDER THE FIRST AMENDMENT AND ARTICLE II, SECTION 7, MONTANA CONSTITUTION

In support of her contention that the District violated her right to free speech, Griffith submits, first of all, that "the Butte High School graduation ceremony was

a limited public forum in that it had been opened to individual expression by valedictorians." (Appellant's Brief, pp. 27 & 28). Griffith goes on to state that, in *Nurre vs. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), the Court "held that, for summary judgment purposes, there was sufficient evidence showing that a school had created a limited public forum for student expression at a high school graduation ceremony where it had a custom or policy of allowing wind ensemble students to choose a piece from the repertoire to play at graduation." (Appellant's Brief, p. 28).

This was not the holding of the Court in *Nurre*. Rather, regarding the type of forum created by a school when holding a graduation ceremony, the Court stated as follows:

> *We have never definitively determined what forum is created when a school district holds graduation, or, as in this case, when part of the graduation ceremony presents student-selected work. However, we need not answer the question, as the District does not challenge Nurre's contention that a limited public forum existed here. Instead, it simply argues that the restriction placed on Nurre was reasonable in light of the purpose served by graduation ceremonies. Therefore, we assume, without deciding, that a limited public forum was created.*

Nurre, supra, at 1094.

It is the position of the District that neither the decision to hold a graduation ceremony, nor the decision to grant valedictorians the opportunity to speak during the graduation ceremony, constitutes the creation of a forum in which students have a right to address the audience in words of their choosing. To the contrary, it

is undisputed in this case that the policy and practice of the District was to require valedictorians to submit proposed speeches for review by District personnel, and that the District reserved the right to edit those speeches for content. The District's practice of exercising control over student speech during the graduation ceremony is contrary to the assertion that the District created a forum permitting valedictorians to "address the audience in words of [their] choosing." (Appellant's Brief, p. 29)

"Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799-800, 105 S.Ct. 3439 (1985). In this case, the District's practices and policies clearly indicate that the District has chosen not to permit valedictorians speaking at graduation to engage in unlimited speech before a captured audience.

To the extent that the District may have created a "limited public forum" by permitting valedictorians to give prescreened, edited speeches during the graduation ceremony, it is the position of the District that its request that Griffith refrain from expressions of personal religious beliefs was both reasonable in light of the purposes of the graduation ceremony, and viewpoint neutral. "It is...black-

letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum." *Davenport vs. Washington Education Assoc.*, 551 U.S. 177, 188, 127 S.Ct. 2372, 2381 (2007).

The case of *Diloreto vs. Downey Unif. Sch. Dist. Bd. of Ed.*, 196 F.3d 958 (9th Cir. 1999) is instructive in that it addresses permissible restrictions by a school district in a "nonpublic forum open for a limited purpose." In *DiLoreto*, the Downey Unified School District sold advertising space on the fence surrounding its baseball field. DiLoreto sued the district after the district refused to post his advertisement displaying the Ten Commandments, alleging that the district's refusal violated his rights under the First Amendment. The district asserted the defense that posting the advertisement would constitute a violation of the Establishment Clause, and further that the district feared the disruption and controversy that may result.

The Court concluded that "the intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression." *DiLoreto*, supra, at 966 & 967. Additionally, "the fact that the District screened and rejected the ad is evidence that the District intended to create a limited public forum closed to certain subjects, such as religion." *Id.* Based

primarily upon those conclusions, the Court then determined that the fence in question was a "nonpublic forum open for a limited purpose," or, in other words, a limited public forum. *DiLoreto*, supra, at 967.

After determining that the school district created a limited public forum, the Court went on to determine whether a constitutional violation had occurred. The Court first looked to whether closing the forum to religious messages was reasonable. "In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter ... so long as the distinctions drawn are reasonable in light of the purpose served by the forum' and all the surrounding circumstances. *DiLoreto*, supra, at 967 (citations omitted). The Court concluded that the district's fear of "controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post" was a reasonable basis for excluding the subject of religion from the forum. *DiLoreto*, supra, at 968 & 969.

However, because "the District's decision not to post the ad was reasonable in light of the purpose served by the forum, it may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content," further analysis was required. *DiLoreto*, supra, at 969. As the Court explained:

> *Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic. In contrast, impermissible viewpoint discrimination is a form of*

> *content discrimination in which the government "targets not subject matter, but particular views taken by speakers on a subject."*

Id. The Court ultimately concluded that DiLoreto's advertisement was not "a statement addressing otherwise permissible subjects from a religious perspective," and, as a result, the district's refusal to post the advertisement constituted a content-based, as opposed to viewpoint-based, exclusion. *DiLoreto*, supra, at 969 & 970.

Similar to the circumstances in *DiLoreto*, the District in this case did not intend to create a forum during which valedictorians would be permitted to speak on any topic they choose. This is amply evidenced by the undisputed fact that the District required valedictorian speeches to be submitted in advance of graduation and edited for content. Like *DiLoreto*, the fact that the District screened and retained editorial control over speeches establishes an intent to close the forum of valedictorian speeches to certain topics, including religion.

Griffith's position in this case is that her proposed speech merely addressed permissible subjects from a religious viewpoint, and, as a result, the District's actions constituted viewpoint discrimination. However, as stated by Griffith, the topic of valedictory speeches was to "be relevant to the closing of our high school years." (Appellant's Brief, p. 3). Even though she may have felt "compelled by her religious beliefs [to] recognize and acknowledge the role of God and Christ in

her life," (Appellant's Brief, p. 4) the intent was clearly that the speeches address school-related experiences, and not "the role of God and Christ."

While Griffith's proposed speech primarily related her high school experiences, the religious references at issue went beyond the expected subject matter for valedictorian speeches. Her discussion of the role of God and Christ in her life did not constitute statements addressing otherwise permissible subjects from a religious perspective. Rather, that portion of the speech injected a religious discussion into a speech that was otherwise consistent with District policies and practices.

To the extent, then, that the District may have created a limited public forum by permitting valedictorians to speak at graduation, the District's request that the religious references be removed from Griffith's speech was both reasonable and viewpoint neutral. It was not Griffith's religious viewpoint the District sought to exclude from her speech, but any religious content in general.

Furthermore, given the specific nature of the forum in question, i.e. a high school graduation ceremony, it is submitted that the District was entitled to go further in restricting content than in some other forum. For example, Griffith's proposed religious speech would have been entirely permissible in the school hallway in the context of a discussion among peers.

The various cases cited by Griffith in support of her free speech claims all address some forum other than a graduation ceremony. For example, Griffith asserts that the Court concluded in *Lamb's Chapel vs. Center Moriches Union Free School District*, 508 U.S. 384 (1993) "that a school district could not permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious perspective..." (Appellant's Brief, pp. 29 & 30)

Griffith cites *Rosenberger vs. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) for the Court's determination that a university may not refuse to fund a student publication "because it addressed issues from a religious perspective." (Appellant's Brief, p. 30). Griffith references *Good News Club vs. Milford Central School*, 583 U.S. 98 (2001) for the proposition that "the Court found viewpoint discrimination where a public school permitted nonreligious groups to meet on school property after school but prohibited a Christian club from doing so." (Appellant's Brief, p. 30.).

What Griffith has failed to recognize is the fundamental difference between a high school graduation ceremony conducted on school property, and the use of school property by an outside group, such as in *Lamb's Chapel* or *Good News Club*, or the contents of a student publication, as in *Rosenberger*. When a Christian club utilizes school property as a meeting place, members of the public

are free to participate in the meetings, or not, as they see fit. Similarly, use of school property for the purposes of discussion of family issues and child rearing, whether from a religious viewpoint or not, freely permits participants to come and go as they please. People are free to not read a student publication if they disagree with or are offended by its contents.

The purpose of a high school graduation ceremony is not to host an open forum on family issues and childrearing, nor to provide a meeting place for clubs, Christian or otherwise, nor is the purpose of the graduation ceremony to publish religious points of view that people are free to read or not as they see fit. As correctly stated by the District Court in this case:

> *A high school graduation ceremony is not intended to be a forum for expression of individual student religious views. It is to recognize the achievement of meeting the requirements for graduation and to honor graduates in a sectarian setting.*

(District Court Order, p. 13).

In *Lassonde vs. Pleasonton Unified School Dist.*, 320 F.3d 979 (9th Cir 2003), the Court contrasted the situation in that case (a student was required to remove religious references from his graduation speech) to the situation addressed by the Court in *Good News Club* as follows:

> *The decision in* Good News Club *hinged on the fact that "the school ha[d] no valid Establishment Clause interest" in precluding religious speech in that context. The censored religious activities took place outside school hours, and participation was purely voluntary. The Court carefully distinguished its decision in* Lee, *recognizing that* Lee *had "concluded that attendance at the*

graduation exercise was obligatory." "Here, where the school facilities are being used for a nonschool function and there is no government sponsorship of the Club's activities, Lee *is inapposite."*

The setting of Plaintiff's case is the same as that in Lee. *The graduation ceremony was a school-sponsored function that all graduating seniors could be expected to attend. Unlike in* Good News Club, *where circumstances made the "consideration of coercive pressure and perceptions of endorsement" essentially irrelevant, here those issues are in the forefront.*

In short, the two situations are materially different. The after-hours meetings in Good News Club *lacked the imprimatur of the school, whereas the essence of graduation is to place the school's imprimatur on the ceremony-including the student speakers that the school selected.* Good News Club *involved only the voluntary participation of some students, with prior parental permission, whereas the essence of high school graduation is the participation of all, as a captive audience.* Good News Club *does not change the result that* Cole *demands.*

Lassonde, supra, at 985 (internal citations omitted).

The Court's reference to *Cole* is a reference to *Cole vs. Oroville Union High School Dist.,* 228 F.3d 1092 (9th Cir. 2000), a case which was also relied upon by the District Court in this case. The "result that *Cole* demands" is that a school district does not violate the First Amendment rights of a student by preventing the student from giving "a sectarian, proselytizing speech as part of the graduation ceremony." *Cole*, supra, at 1103.

While the facts of *Cole* are somewhat distinguishable from this case to the extent that Cole's proposed speech could easily be characterized as a religious sermon, whereas Griffith's proposed speech merely contained references to her personal religious beliefs, the fact remains that the District's "plenary control over

the graduation ceremony, especially student speech, makes it apparent [Griffith's] speech would have borne the imprint of the District." *Cole*, supra, at 1103.

The difference between Cole's proposed speech and the speech proposed by Griffith is a matter of degree of religious content, with Cole's speech being at one end of the spectrum, and Griffith's much nearer the other. Griffith's position is that the District was somehow obligated to permit her non-proselytizing, non-prayer expression of her personal religious views, but at the same time not permit speech that would more clearly constitute a violation of the Establishment Clause. The problem, of course, is where should the line be drawn? A more serious problem is whether such a policy could actually be enforced.

Such a policy would require district administrators to review speeches for religious content, and then make a judgment call as to whether the speech contained too much religious speech to be permitted at graduation. Some expression of personal religious views would be permitted, and some would not. Furthermore, the decision as to what was allowed and what not would be entirely subjective, and would most likely differ depending upon who was making the determination.

If districts are required to make such a determination in the event that they permit student speakers during graduation ceremonies, the only sure way to avoid litigation would be to not permit students to speak during graduation. In other

words, if the constitution requires districts to permit just enough, but not too much, student religious speech during graduation, the outcome will certainly be more litigation, either by plaintiffs complaining that their religious speech was permissible, or by plaintiffs complaining that they have been subjected to too much religious speech, or even possibly by both.

The District's request that Griffith remove religious expressions from her valedictorian speech did not violate her right to free speech under either the First Amendment or Article II, section 7 of the Montana Constitution. Considering the compulsory nature of the graduation ceremony, the degree of control exercised by the District over the graduation ceremony, the risk of appearance of endorsement of student religious speech by the District, and "the virtual impossibility of drawing a line between permissible and non-permissible religious expression" (District Court Order, pp. 13 & 14), the actions of the District were reasonable, and did not violate Griffith's free speech rights.

F. FREE EXERCISE OF RELIGION

Griffith asserts that the actions of the District have violated her right to freely exercise her religion under the First Amendment as well as Article II, Section 5 of the Montana Constitution. The basis for this position is set forth in Griffith's affidavit, submitted in support of her Motion for Summary Judgment:

> *As pointed out in Griffith's affidavit, when she was composing the remarks she would give at graduation she felt compelled to mention Christ and God*

> *in those remarks because "I cannot accurately convey my high school experience without mentioning the reason behind my successes, my actions, and my purpose in life."*

Appellant's Brief, p. 35).

This Court has recognized the test adopted by the U.S. Supreme Court for determining whether there is a burden on the free exercise of religion as follows:

> *Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.*

Valley Christian School vs. Montana High School Assoc., 2004 MT 41, ¶ 7, 320 MT. 81, 86 P.3d 554 (2004), quoting *Thomas v. Review Bd. of Indiana Employment Sec. Division*, 450 U.S. 707, 717-18 (1981).

Griffith has asserted that her speech would have been inaccurate without the religious references, because her religious beliefs are the reason behind her successes and actions. What Griffith has not done is identify any conduct proscribed by her religious faith that the District compelled her to perform, or any conduct mandated by her religious belief that the District prevented or obstructed.

Griffith has not shown, or even alleged, that her religious belief mandates that she include personal expressions of her religious beliefs in her valedictorian speech. She has not alleged that her religious faith proscribes the delivery of a valedictorian speech free from expressions of personal religious beliefs. The fact

that Griffith felt a personal compulsion to express her personal religious beliefs during her speech is not the same as her being mandated to do so by her religious faith.

The District's request that Griffith refrain from expressing her personal religious beliefs during the short period of time she would be speaking during the graduation ceremony does not constitute an undue burden upon the exercise of her religion. "The United States Supreme Court has held that the free exercise clause does not imply that incidental effects of government programs which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Valley Christian School*, supra, ¶ 12. The District has not, in any way, shape or form, coerced Griffith into acting contrary to her religious beliefs.

G. DUE PROCESS UNDER THE 14TH AMENDMENT

Finally Griffith asserts that the District's actions violated her rights under the equal protection clause of the 14th Amendment. The same issue was addressed by the 9th Circuit in *Nurre*, and disposed of by the Court on the basis that the "requirement that all musical selections be secular was a reasonable action taken to avoid confrontation with the Establishment Clause." *Nurre* supra, at 1099.

Griffith, however, cites to the case of *Seidman vs. Paradise Valley Unified*

Sch. Dist. No 69, 327 F.Supp. 2d 1098 (D. Ariz. 2004) for the proposition that "once a forum is opened for speaking on a particular topic, a school cannot prohibit others from speaking on the basis that what they intend to say has been spoken from a religious perspective." (Appellant's Brief, p. 39). In *Seidman*, a school district was found to have violated the equal protection rights of parents wishing to purchase tiles to be permanently displayed in the school because the school district rejected tiles containing a religious message. As noted by Griffith, the Court's basis was that:

> *Because the Defendants' policy provided no guidance as to what type of speech was appropriate for the forum, the exclusions in this case were based entirely on the religious content of the expression.*

Seidman, supra, at 1115.

The District, however, has a comprehensive policy in place addressing student religious activity at school. A review of District Policy 2332 (Appendix 1, Appellant's Brief) will reveal that, while attending Butte High School, Griffith was free to engage in private religious expression. She was entitled under the policy to "pray individually or in groups and discuss [her] religious views with other students," provided only that she not be "disruptive or coercive." She was free to "express [her] individual religious beliefs in reports, tests, homework, and projects." Thus, District policy and practice restricts religious expression only narrowly, prohibiting disruption, coercion, religious expression before a captive

audience, and disallowing religious expression by student speakers at the graduation ceremony.

The policy was clearly drafted with the specific intent of maintaining District neutrality towards religion, as is required by the Establishment Clause. The policy permits personal religious expression by students in all circumstances and situations where it would not appear that the District was endorsing the personal religious viewpoints of the students. The graduation ceremony, however, is not one of those situations. As stated in the policy, "the District sponsors and pays for graduation ceremonies and retains ultimate control over their structure and content."

To avoid risk of appearance of the District endorsing a student speaker's private expression of personal religious views or the appearance of favoring one religion over another, Policy 2332 grants the District ultimate control over the structure and content of a student graduation speaker's speech. Similar to *Nurre*, *Cole*, and *Lassonde*, the District's actions were entirely reasonable. As such, Griffith did not have any right to give her proposed speech at graduation containing religious references, and her rights have not been violated.

V. CONCLUSION

Griffith has certified to this Court that there is no money damages sought in this case. Given that Griffith has not appealed the determination of the District

Court that the MHRA has not been violated, and considering that Griffith is no longer a student of the Butte School District, Griffith's claims are moot, and must be dismissed.

Griffith's claims are also barred by the exclusive remedy provision of the MHRA. The District Court correctly concluded that the gravamen of the factual allegations in this case was discrimination in education, and Griffith's remaining causes of action are thereby barred by § 49-2-512(1), MCA, inclusive of her claims brought pursuant to 42 U.S.C. § 1983. The statue prevents the District Court from entertaining any claim or request for relief other than under the provisions of the MHRA, and the District Court applied the statute as written. While Griffith has asserted that application of the statute as written violated the Supremacy Clause of the U.S. Constitution, this Court is precluded from considering that argument pursuant to Rule 27, M.R.App.P.

Finally, taking into consideration the unique forum at issue in this case, i.e. a graduation ceremony with a captured audience, the actions of the District did not infringe upon Griffith's free speech rights, nor has there been a violation of the due process clause of the Fourteenth Amendment. Furthermore, Griffith has failed to establish any tenant of her religion requiring that she express her personal religious views during the graduation ceremony, and, in any event, the actions of the District have placed no burden on the free exercise of her religion.

Based upon the foregoing, and the record in this case, the Appellant requests that the Order of the District Court be affirmed, or, alternatively, that Griffith's remaining claims be dismissed with prejudice based on the doctrine of mootness.

RESPECTFULLY SUBMITTED this 12th day of July, 2010.

By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that the Defendant/Appellees' Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word 98 for Windows, is not more than 10,000 words (5,000 for reply), not averaging more than 280 words per page, and containing approximately 10,000 words, excluding certificate of service and certificate of compliance.

DATED this 12th day of July, 2010.

_____

Tony C. Koenig

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2010, I caused a true and accurate copy of the foregoing to be served by U.S. mail, postage prepaid, upon the following:

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